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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 TERESA WYATT, Individually and On
12 Behalf of All Others Similarly Situated,

13 Plaintiff,

14 vs.

15 CELLCO PARTNERSHIP, A Delaware
16 General Partnership d/b/a VERIZON
17 WIRELESS,

18 Defendant.

CASE NO. 07 CV 2265 JM (CAB)

**ORDER DENYING MOTION TO
COMPEL ARBITRATION AND
DENYING PLAINTIFF'S
OBJECTIONS TO RULING AND
REQUEST FOR
RECONSIDERATION OF
MAGISTRATE JUDGE'S RULING**

(Doc. Nos. 11, 23)

19 Plaintiff Teresa Wyatt filed this putative class action on November 30, 2007. On January 30,
20 2008, she filed an amended complaint. Defendant Cellco Partnership d.b.a. Verizon Wireless now
21 moves to compel arbitration. (Doc. no. 11.) Defendant acknowledges that the court must deny the
22 motion under Ninth Circuit precedent and brings the motion to preserve its appellate rights. Plaintiff
23 opposes the motion and also filed an objection to and request for reconsideration of Magistrate Judge
24 Bencivengo's April 14, 2008 order denying Plaintiff's request for leave to conduct discovery
25 regarding the motion to compel arbitration ("the Discovery Order"). (Docs. no. 23-26.) Defendant's
26 reply includes an opposition to Plaintiff's objection. (Doc. no. 27.) Pursuant to Local Rule 7.1(d)(1),
27 this matter is appropriate for decision without oral argument. For the reasons set forth below, the
28 court denies the motion to compel arbitration and denies Plaintiff's objections to and request for

1 reconsideration of the Discovery Order.

2 **I. BACKGROUND**

3 Plaintiff purchased a BlackBerry 8830 Smartphone from Defendant. When Plaintiff purchased
4 her phone, she allegedly signed a Customer Agreement providing, in pertinent part, that disputes will
5 be settled only by arbitration but that the agreement “doesn’t permit class arbitrations even if [the
6 procedures or rules of the American Arbitration Association or Better Business Bureau] would.”
7 (Decl. of S. Mageo in Supp. of Mot., Exh. 2 at 13.) The agreement further provides that, if the
8 prohibition on class arbitration is deemed unenforceable, the arbitration agreement will not apply.
9 (Decl. of S. Mageo, Exh. 2 at 13.)

10 In her class action complaint, Plaintiff alleges that defendant violated various California laws
11 in connection with the advertisement and sales of the BlackBerry 8830 Smartphone.

12 **II. DISCUSSION**

13 **A. Motion to Compel Arbitration**

14 The Federal Arbitration Act (“FAA”) applies to arbitration provisions found in written
15 agreements that evidence a transaction involving commerce. 9 U.S.C. § 2. An agreement to arbitrate
16 is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the
17 revocation of any contract.” Id. The court must grant a motion to compel arbitration if (1) a valid
18 agreement to arbitrate exists, and (2) the dispute at issue falls within the scope of that agreement. See
19 Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). The court lacks
20 discretion to deny a motion to compel arbitration if a valid arbitration provision exists. See 9 U.S.C.
21 § 4; Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

22 Federal policy favors arbitration, and arbitration agreements may not be placed in a disfavored
23 position relative to other contracts. See Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170 (9th
24 Cir. 2003). Nevertheless, arbitration agreements are subject to general contract defenses such as
25 duress, fraud, and unconscionability. See Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal.
26 4th 83, 114 (2000). “To evaluate the validity of an arbitration agreement, federal courts ‘should apply
27 ordinary state-law principles that govern the formation of contracts.’” Ingle, 328 F.3d at 1170
28 (citations omitted). Under California law, a contract provision is unenforceable if it is both

1 procedurally and substantively unconscionable. See Armendariz, 24 Cal. 4th at 114.

2 Here, Defendant seeks to preserve its rights to compel Plaintiff to arbitrate her individual
3 claims against Defendant pursuant to the terms of her Customer Agreement. Defendant acknowledges
4 that the court must deny the motion under controlling Ninth Circuit authority, which holds that
5 consumer arbitration agreements containing class arbitration waivers are unconscionable under
6 California law and that the FAA does not preempt the application of California law to revoke
7 unconscionable class arbitration waivers. See Shroyer v. New Cingular Wireless Services, Inc., 498
8 F.3d 976 (9th Cir. 2007). Thus, Defendant presents the arguments in its motion to preserve them for
9 appeal. (Mot. at 3.)

10 As Defendant concedes and as Shroyer dictates, the motion to compel arbitration cannot
11 succeed under Ninth Circuit law. The court therefore denies the motion.¹

12 **B. Objections to and Request for Reconsideration of Discovery Order**

13 A party wishing to object to a magistrate judge's nondispositive order must serve and file
14 objections within ten days of service of the order. Fed. R. Civ. Proc. 72(a). The court "must consider
15 timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary
16 to law." Id.; see also Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1173-74 (9th Cir. 1996).

17 At the April 14, 2008 Early Neutral Evaluation conference, Magistrate Judge Bencivengo
18 denied Plaintiff's request for leave to conduct discovery regarding the motion to compel arbitration.²
19 Plaintiff argues that the court should reconsider the Discovery Order because the order denied Plaintiff
20 "the opportunity to fully and fairly oppose Defendant's motion" to compel arbitration. (Objections
21 at 2.) Defendant contends that discovery is unnecessary because current Ninth Circuit law provides
22 sufficient grounds for denying the motion to compel arbitration. Defendant also notes that, if the
23 appeal succeeds, Plaintiff can seek discovery upon remand to this court. (Reply at 2.)

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25 ¹Plaintiff urges the court to rule that the record contains insufficient evidence of a written
26 agreement to arbitrate. (See Opp'n at 7-8.) She claims she does not recall signing the agreement.
27 (See id., Wyatt Decl.) This request calls for adjudication of a factual dispute, which is inappropriate
in the context of a motion to compel arbitration. Furthermore, controlling Ninth Circuit law provides
an adequate basis for denying the motion. The court therefore denies the requested relief, without
prejudice to Plaintiff's entitlement to seek determination of the issue at a later time.

28 ²Plaintiff failed to provide the court with evidence of the Discovery Order other than her own
assertion. Defendant does not object to Plaintiff's characterization of the order.


1 Plaintiff has not directed the court to any authority demonstrating that the Discovery Order was
2 clearly erroneous or contrary to law. See Fed. R. Civ. Proc. 72(a). To the contrary, Magistrate Judge
3 Bencivengo's ruling reasonably reflected the fact that Plaintiff can receive all appropriate discovery
4 upon any change in Ninth Circuit law regarding the enforceability of a class arbitration waiver. The
5 court therefore denies the request to reconsider the Discovery Order, without prejudice to Plaintiff's
6 entitlement to renew her discovery request should controlling law change.

7 **III. CONCLUSION**

8 For the foregoing reasons, the court hereby **DENIES** the motion to compel arbitration and
9 **DENIES** the objections to and request for reconsideration of the Discovery Order.

10 **IT IS SO ORDERED.**

11 DATED: May 13, 2008

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13 Hon. Jeffrey T. Miller
United States District Judge

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